No. 636 5

In the Supreme Court of the United States

OCTOBER TERM, 1955

CHARLES ROWOLDT, PETITIONER

v.

J. D. PERFETTO, Acting Officer in Charge, Immigration and Naturalization Service, Department of Justice, St. Paul, Minnesota

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-4a) is reported at 228 F. 2d 109. The opinion of the District Court appears at pages 196-199 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered December 22, 1955 (Pet. App. 5a). The petition for a writ of certiorari was filed February 9,

1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the order for the deportation of petitioner as one who, after entry, had been a member of the Communist Party is based on evidence showing more than nominal membership in the party.

STATUTE INVOLVED

Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, provided in part as follows:

> That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States * * *.

Section 4 under the aforesaid Section 22 provided in part:

> (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of

the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.[1]

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals affirming the dismissal by the District Court for Minnesota of his petition for a writ of habeas corpus in which he attacked the validity of an order directing his deportation on the ground that he is an alien who, after entry, had been a member of the Communist Party.

The immigration file, which was annexed to respondent's return (R. 15-16) and is part of the record, shows that petitioner, who was born in Germany in 1883, entered the United States for permanent residence in 1914 and last entered the United States in 1924 (R. 57, 104). In 1936, he was ordered deported on the ground that he was a member of an organization (the Communist Party) which advocated the overthrow of the government by force and violence, but the order was not executed. The proceedings were cancelled in 1942 on the authority of *Kessler* v. *Strecker*, 307 U. S. 22

[1] These provisions were repealed by Section 403(a)(16) of the Immigration and Nationality Act of June 27, 1952 (66 Stat. 163, 279). The 1952 Act recodified and reenacted these provisions without material change. See Section 241(a)(6)(C), 66 Stat. 204, 8 U.S.C. 1251(a)(6)(C).

for the reason that petitioner was not shown to have been a member of the Party at the time of the hearing (see R. 22-23).

In 1948, after past membership in an organization advocating the violent overthrow of the government, had been made a ground of deportation by the Act of June 28, 1940 (54 Stat. 673), petitioner was served with a warrant charging him with having been affiliated with such an organization (R. 52-54, 95). Hearings under the warrant were invalidated by reason of the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, that deportation hearings must be conducted in accordance with the Administrative Procedure Act (R. 46). After Congress, by a rider to the Appropriation Act of 1951 (64 Stat. 1044, 1048) exempted deportation hearings from the Administrative Procedure Act, a new hearing was commenced on February 16, 1951. On that date, an additional charge was lodged against petitioner under Section 22 of the Internal Security Act of 1950 (*supra*, p. 2) charging him with having been, after entry, a member of the Communist Party of the United States (R. 46, 75). The hearing was then adjourned to March 28, 1951, to allow petitioner time to meet the additional charge (R. 75). At the conclusion of the adjourned hearing, the hearing officer found petitioner deportable as an alien who had been, after entry, a member of the Communist Party (R. 46-49). His recommendation was approved by the Assistant Commissioner (R. 36-40) and an appeal to the Board of Immigration Appeals was dismissed, the Board concluding that the evidence

supported the finding of membership in the Communist Party (R. 22-23).

The evidence of petitioner's membership rests for the most part on sworn testimony by petitioner himself before an immigration inspector on January 10, 1947. After the inspector had warned petitioner that anything he said might be used against him and petitioner had made statements, not under oath, to the effect that he wanted to return to Germany and for that reason had not fought very hard on his petition for naturalization (R. 100-102), petitioner agreed to give testimony under oath. After being sworn, he stated that he joined both the Communist Party and the Workers Alliance in the spring or early summer of 1935. He testified that there were no dues books in the Party, but that someone collected dues (R. 105). The Workers Alliance had dues books (R. 105). Petitioner dropped out of the Communist Party but remained in the Workers Alliance when he was arrested in the first deportation proceedings at the end of 1935 (R. 105). He was on the executive board of the Workers Alliance (R. 105). When asked whether he was an active worker in the Communist Party, he replied "The only active work I did was running the bookstore for a while" (R. 107). The following ensued (R. 107):

> Q. Did you own the bookstore?
>
> A. No, I didn't get a penny there.
>
> Q. What was the arrangement there?
>
> A. I was kind of a salesman in there, but the Communist Party ran it.

Q. You secured this employment through your membership in the Communist Party?

A. Yes.

Q. Was this store an official outlet for communist literature?

A. Yes.

In answer to a question as to whether he had joined the Communist Party because of dissatisfaction in living in a democracy, (R. 108) petitioner gave the answers quoted at page 4 of his petition to the effect that his joining was "'a matter of having no jobs at that time"; that it was necessary to fight for food and shelter (R. 108-109).

An order directing petitioner's deportation was issued on April 16, 1952 (R. 120). In March, 1955, after petitioner had been taken into custody for immediate deportation to Germany, the petition for habeas corpus was filed (R. 3-5).[2]

In dismissing the petition, the District Court held that the evidence produced at the hearing sustained petitioner's deportability under the definition of membership laid down by this Court in *Galvan v. Press*, 347 U. S. 522 (R. 198).[3] The Court of Appeals, in affirming the order of the District

[2] After the original petition for habeas corpus was filed, a supplemental petition alleged, as an additional reason for a stay of deportation, that petitioner had applied to the Board of Immigration Appeals for vacation of the order of deportation in order to enable him to apply for suspension of deportation (R. 7-12). That motion, we are informed, was denied by the Board of Immigration Appeals in June, 1955, after the judgment of the district court in this proceeding.

[3] The original petition for habeas corpus challenged generally the constitutionality of the order of deportation and the propriety of the procedures (R. 3-5). After the hearing

Court, held that there was "an adequate evidentiary basis for the finding that Rowoldt was a member of the Communist Party in 1935" and that like Galvan (347 U. S. at p. 529) "the record does not show a relationship to the party so nominal as not to make him a 'member' within the terms of the Act." (Pet. App. 4a).

ARGUMENT

As both courts below held (see *supra*), the evidence at the deportation hearing showed that petitioner's membership in the Communist Party in 1935 was not, as petitioner claims (Pet. 5-10), the type of nominal membership to which this Court adverted in its opinion in *Galvan* v. *Press*, 347 U. S. 522, 527. Rather, like *Galvan*, the record shows that petitioner "joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will" (347 U. S. at p. 528). Petitioner was aware of the difference between the Workers Alliance and the Communist Party for he himself explained the different methods of paying dues in each organization, and further stated that he dropped out of the Party at the time of his first arrest for deportation at the end of 1935; but continued to be active in the Alliance (R. 105). While he testified that his motive in joining the Party was not to overthrow the government but to fight for jobs and shelter (R. 108), this was a statement of

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on an order to show cause why the writ should not issue, the District Court permitted petitioner to amend his petition to raise specifically the question of the sufficiency of the evidence to support the order of deportation (R. 187-188).

general philosophy, not an indication that he joined to obtain the necessities of life. There is nothing in his testimony to show that he joined the Party as a means of getting food or money for himself. On the contrary, his testimony was that he ran the bookstore for the Party but "didn't get a penny there" (R. 107). Whatever may be the situation presented by other cases not before this Court (see Pet. 8-9), petitioner's activity in running the Communist bookstore itself shows that his membership was active and knowing. Since the evidence of the character of petitioner's membership is comparable to that before this Court in *Galvan*, his request for reconsideration of the *Galvan* ruling on the constitutionality of the statute in the light of the facts of his case (Pet. 10) raises no issues not decided by that opinion.[3]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1956.

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[3]See also the cases of Mascitti and Mrs. Coleman in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 582-3.

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